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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Xfinity Mobile, et al.,

10 Plaintiffs,

11 v.

12 Globalgurutech LLC, et al.,

13 Defendants.
14

No. CV-22-01950-PHX-SMB

ORDER

15 Before the Court is Plaintiffs' Motion for Leave to File Second Amended Complaint
16 (Doc. 87), Defendants' Response (Doc. 92), and Plaintiffs' Reply (Doc. 94). The Court
17 will exercise its discretion to resolve the Motion without oral argument. *See* LRCiv 7.2(f)
18 ("The Court may decide motions without oral argument."). After reviewing the briefing
19 and relevant law, the Court will grant, in part, Plaintiffs' Motion for the following reasons.

20 **I. BACKGROUND**

21 The Court set forth the background facts of the case in its June 14, 2023 Order
22 striking portions of Plaintiffs' Complaint with leave to amend and dismissing a civil
23 conspiracy claim (Count 4) and trademark claims (Counts 10, 11, and 12) (Doc. 35).
24 Plaintiffs then timely filed their Amended Complaint (Doc. 39). Defendants moved to
25 dismiss those same claims in Plaintiffs' Amended Complaint (Doc. 44), which the Court
26 granted (Doc. 77). Plaintiffs are now seeking leave again to amend their Complaint to add
27 back the dismissed Counts. (Doc. 87.) The relevant new alleged facts are addressed in
28 turn.

II. LEGAL STANDARD

The grant or denial of an opportunity to amend a complaint is within the Court’s discretion, but it “should freely give leave when justice so requires.” *Foman v. Davis*, 371 U.S. 178, 183 (1962); Fed. R. Civ. P. 15(a)(2). In exercising that discretion, “a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities.” *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (citation omitted). The Court considers five factors to evaluate a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the plaintiff previously amended the complaint. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (“Futility alone can justify the denial of a motion for leave to amend.”).

An amendment is futile where it is “subject to dismissal” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998); *see also Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“[A] court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally.”). “[T]he proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6).” *Do v. Ariz. State Univ.*, No. CV-22-00190-PHX-JJT, 2023 WL 8622628, at *2 (D. Ariz. Dec. 13, 2023) (quoting *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011), *aff’d on reh’g en banc on other grounds*, 681 F.3d 1041 (9th Cir. 2012)). Surviving a Rule 12(b)(6) motion requires a complaint to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. DISCUSSION

A. Timeliness

Plaintiffs first argue that the Court should strike Defendants’ Response because it is untimely under Local Rule 7.2(c), which requires serving and filing a responsive pleading fourteen days after initial service. (Doc. 94 at 2–3.) Plaintiffs filed and served their Motion

1 for Leave to Amend on March 29, 2024. (Doc. 87.) The deadline to file a responsive
 2 pleading was April 12, 2024. LRCiv. 7.2(c); Fed. R. Civ. P. 6(a)(1). Defendants did not
 3 file their Response until April 15, 2024. (Doc. 92). Although Defendants did not file and
 4 serve its Response in time, the Court will use its discretion to not find the non-compliance
 5 with the filing deadline constitutes consent to granting Plaintiffs' Motion. LRCiv. 7.2(i);
 6 *Buchanan v. Ghandi*, No. CV-22-01482-PHX-SMB, 2024 WL 1240192, at *2 (D. Ariz.
 7 Mar. 22, 2024).

8 The Court cautions against untimely filings, but whether the Court strikes
 9 Defendants' Response is not dispositive in this matter. Even so, granting a motion to strike
 10 is discretionary, *Sunburst Mins., LLC v. Emerald Copper Corp.*, 300 F. Supp. 3d 1056,
 11 1059 (D. Ariz. 2018), and is generally disfavored absent prejudice to the non-moving party,
 12 *Cooper v. Window Rock Unified Sch. Dist.*, No. CV-20-08346-PCT-DJH, 2023 WL
 13 2463765 (D. Ariz. Mar. 10, 2023), *aff'd*, No. 23-15527, 2024 WL 575138 (9th Cir. Feb.
 14 13, 2024). Plaintiffs did not directly move to strike Defendant's Response, instead they
 15 opted to raise the issue in their Reply, which thoroughly addressed the merits of
 16 Defendants' untimely arguments. Therefore, because no prejudice would result, the Court
 17 declines to strike Defendants' Response.

18 **B. Bad Faith, Undue Delay, and Prejudice**

19 Plaintiffs argue that they moved in good faith without intending to cause undue
 20 delay and that granting the Motion would not cause prejudice to the Defendants. (Doc. 87
 21 at 3–5.) The Court finds no reason to disagree with Plaintiffs' position, nor do the
 22 Defendants argue otherwise. (Doc. 92.) Further, given the Court's disposition in this
 23 matter, Defendants suffer no prejudice. Therefore, the court finds that Plaintiffs' Motion
 24 was made in good faith and would not cause undue delay or prejudice.

25 **C. Previous Amendments to the Complaint**

26 Plaintiffs argue that their proposed amendments address the Court's dismissal of the
 27 conspiracy and trademark claims (Docs. 35, 77). (Doc. 94 at 3–4.) Defendants argue that
 28 Plaintiffs rely on the same speculation to establish the alleged conspiracy and they simply

1 identify people and entities that Defendants have done business with. (Doc. 92 at 5–6.)
 2 Defendants also point to Seventh Circuit case law to argue repeated failures to cure the
 3 deficiencies warrants denial of leave to amend but such a reliance is unnecessary. *See Lee*
 4 *v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 912 F.3d 1049, 1052–53 (7th Cir. 2019)
 5 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Weighing repeated opportunities to
 6 cure a defect in a complaint is consistent with this Circuit's treatment of the *Foman* factors,
 7 which includes "repeated failure to cure deficiencies by amendments previously allowed."
 8 *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman*,
 9 371 U.S. at 182)); *see also Nunes*, 375 F.3d at 808.

10 Although the substance to Plaintiffs' changes is relevant, the Court will address the
 11 substance in the proposed changes under the futility factor. Relevant here are Plaintiffs'
 12 previous attempts to cure the deficiencies in their claims. *See Brown*, 953 F.3d 574
 13 (analyzing the futility of a proposed third amended complaint after the plaintiff alleged
 14 new evidence). As Defendants highlight, the Court previously found Plaintiffs' conspiracy
 15 claim deficient and too speculative, first in failing to name a sufficient number of
 16 co-conspirators (Doc. 35 at 7), then, after they named potential co-conspirators, they failed
 17 to provide facts to support more than a suspicion of a conspiracy (Doc. 77 at 3–4). Granting
 18 leave to file a Second Amended Complaint is effectively a third attempt for Plaintiffs to
 19 establish their conspiracy and trademark claims. The Court finds this factor weighs against
 20 granting Plaintiffs' Motion.

21 **D. Futility of the Conspiracy Claim**

22 Plaintiffs argue that since the Court's prior finding that they only held mere
 23 suspicions of a conspiracy (Doc. 77 at 3–4), newly produced purchase and sales records
 24 show transactions involving sales of their phones procured through fraud. (Doc. 87 at 6.)
 25 Plaintiffs also argue that they alleged "specific unlawful conduct in which two
 26 co-conspirators engaged to demonstrate that Defendants operate an identical scheme of
 27 common design and are engaged in similar or identical unlawful conduct with their
 28 co-conspirators." (Doc. 94 at 6.) Defendants argue that Plaintiffs have only established

1 the existence of arms-length business transactions but not the existence of communications
2 or an agreement between Defendants to commit an underlying tort. (Doc. 92 at 6–7.)

3 Defendants are correct. Civil conspiracy requires that “two or more individuals
4 agree and thereupon accomplish an underlying tort which the alleged conspirators agreed
5 to commit.” *Wojtunik v. Kealy*, 394 F. Supp. 2d 1149, 1172 (D. Ariz. 2005) (cleaned up).
6 A conspiracy may also be reasonably inferred if “parties have reached ‘a unity of purpose
7 or a common design and understanding, or a meeting of minds in an unlawful
8 arrangement.’” *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 668 F.2d
9 1014, 1055–56 (9th Cir. 1981) (quoting *American Tobacco Co. v. United States*, 328 U.S.
10 781, 809–10 (1946)).

11 First, Plaintiffs mistakenly rely on *William Inglis & Sons Baking Co.* In that case,
12 the plaintiff had named defendants involved in an alleged “horizontal” conspiracy between
13 three baking companies. *See William Inglis & Sons Baking Co.*, 668 F.2d at 1023–24. In
14 responding to a motion for summary judgment, plaintiff alleged a “vertical” conspiracy
15 between one of the baking companies, its parent company, and a consulting firm not named
16 in the complaint. *Id.* at 1023–24, 1052–54. The Ninth Circuit found it was proper for the
17 district court to allow the plaintiff to use the vertical conspiracy to defeat summary
18 judgment. *Id.* at 1053–54 (reasoning that alleging the “horizontal” conspiracy provided
19 defendants with notice because plaintiff previously named the parent company and
20 consulting firm as unnamed co-conspirators in an interrogatory). The Ninth Circuit
21 concluded that a “vertical” conspiracy could exist, plaintiff must show that the subsidiary
22 and parent company had a mutual understanding “with the specific intent of each to restrain
23 trade.” *Id.* at 1054–55.

24 Plaintiffs flip that case on its head. This is not an issue of notice of potential
25 co-conspirators. The issue is Plaintiffs’ factual support in alleging an agreement to support
26 their conspiracy claims, of which Defendants are actively defending themselves against.
27 Plaintiffs first claimed the named Defendants “acted as a single entity,” owned and
28 managed by a single Defendant, Jakob Zahara, to advance the conspiracy. Plaintiffs then

1 alleged three third-party co-conspirators (Doc. 39 at 22–23 ¶ 107), but as this Court found,
 2 they failed to allege any communications, agreement, or business transactions between
 3 Defendants and the third-party co-conspirators (Doc. 77 at 3). Now, Plaintiffs allege that
 4 Defendants sold locked phones to an international company, purchased fraudulently
 5 obtained phones and sold them to a “known handset traffick[ing]” company, and engaged
 6 in substantial business transactions with a company previously indicted for selling stolen
 7 phones. (Docs. 87-1 at 16 ¶ 69, 17–19 ¶¶ 73–79; 89-1 at 16 ¶ 69, 17–19 ¶¶ 73–79.)
 8 Plaintiffs also attach documents identifying transactions where Defendants purchased,
 9 shipped, or sold Plaintiffs’ phones with various parties, including those companies. (Docs
 10 87-24 to -26; Docs 89-3 to -5.) These facts address transactions and possibility
 11 communications as they relate to the bare fact that a transaction occurred, but they do not
 12 show an agreement.

13 Plaintiffs have not shown that Defendants had knowledge of the other companies’
 14 misconduct to infer intent to engage in a common unlawful scheme. *See In re Dynamic*
 15 *Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 52–54
 16 (9th Cir. 2022) (finding that overlap involving the same actors between prior price fixing
 17 conspiracies and a subsequent alleged conspiracy supported the subsequent allegation but
 18 was not dispositive because defendants conduct was “more likely explained by lawful,
 19 unchoreographed free-market behavior” (citation omitted)); *McClure Enterprises, Inc. v.*
 20 *Gen. Ins. Co. of Am.*, No. CV05-3491-PHX-SMM, 2009 WL 73677, *1, 9–10 (D. Ariz.
 21 Jan. 9, 2009) (finding a defendant’s knowledge of another defendant’s misclassification
 22 scheme and concealment of that scheme to secure government contracts supported a
 23 conspiracy allegation). Plaintiffs do not allege Defendants’ involvement in alleged prior
 24 misconduct of the other companies. Although Defendants advertise to the public that they
 25 will purchase blocklisted¹ or unlocked phones, this does not suggest Defendants agreed to
 26 participate in an unlawful scheme. Although Plaintiffs’ own analysis revealed that some

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 28 ¹ Plaintiffs describe a “blocklisted” phone as “one that will be denied service on a US
 wireless network because it was stolen, reported as lost, or connected with certain unlawful
 conduct, i.e., identity theft or payment fraud.” (Doc. 87 at 7 n.8.)

1 of the phones sold to Defendants were obtained fraudulently (Doc. 87-1 at 18 ¶ 78), this
2 says nothing about Defendants' knowledge of or role in a purported conspiracy.

3 Plaintiffs once again rely on the legal conclusion that a "conspiracy" exists and
4 supports it with the same allegation that business transactions exist without any evidence
5 to establish an agreement to engage in an unlawful scheme. *See Twombly*, 550 U.S. at 564.
6 Therefore, the repeated opportunities and Plaintiffs' proffered reasons for a Second
7 Amended Complaint are futile and do not support granting leave to amend as to Count
8 Four.

9 **E. Futility of the Trademark Claims**

10 This Court previously found that Defendants established nominative fair use of
11 Plaintiffs' mark, and thus dismissed all trademark claims. (Doc. 77 at 4–7.) Nominative
12 fair use by definition is not infringement. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610
13 F.3d 1171, 1175 (9th Cir. 2010). Finding nominative fair use requires the Court to ask
14 "whether (1) the product was 'readily identifiable' without use of the mark; (2) defendant
15 used more of the mark than necessary; or (3) defendant falsely suggested he was sponsored
16 or endorsed by the trademark holder." *Id.* at 1175–76 (noting the consumers may infer
17 sponsorship or endorsement if a defendant uses "more" of a mark than necessary). The
18 analysis "is appropriate where a defendant has used the plaintiff's mark to describe the
19 plaintiff's product, even if the defendant's ultimate goal is to describe his own product."
20 *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002). Once nominative fair
21 use is established, the burden "reverts to the plaintiff[s] to show likelihood of confusion."
22 *Toyota Motor Sales*, 610 F.3d at 1183.

23 Plaintiffs now assert they have alleged new specific facts that Defendants' use
24 exceeds fair use and is false advertizing. (Doc. 87 at 6–7.) First, Plaintiffs note that the
25 Defendants' website states in its terms of service that "[a]ll trademarks and registered
26 trademarks relating to products and services available through our Website are the sole
27 property of selllocked.com." (*Id.* at 7.) They argue this statement and use of the marks on
28 the website falsely represent a connection or affiliations between the parties and mislead

1 the public about the origin of the products or sponsorship. (*Id.*) Plaintiffs also argue that
2 rather than using a generic identifier or have customers type in the carrier's name,
3 Defendants chose to copy and paste the mark on their website. (Doc. 94 at 8.) This issue
4 is two-fold; Defendants' use of the mark in buying phones and their use in selling.

5 Starting with the buy-side use of the mark. First, the Court notes that it previously
6 ruled that nominative fair use was applicable. (Docs. 35 at 9–10; 77 at 4–6.) The Court,
7 however, erred in finding Defendants used only as much as the mark as reasonably
8 necessary. *Toyota Motor Sales*, 610 F.3d at 1175. The Ninth Circuit has consistently found
9 that using only the words of a mark, without using the stylized mark, is nominative fair
10 use. *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 352 (9th Cir. 1969)
11 (finding relevant that “[defendant] did not use Volkswagen's distinctive lettering style or
12 color scheme, nor did he display the encircled ‘VW’ emblem”); *Applied Underwriters, Inc.*
13 *v. Lichtenegger*, 913 F.3d 884, 895 (9th Cir. 2019) (concluding that using only the words
14 of a mark and not the distinctive lettering was sufficient to support nominative fair use);
15 *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 802 (9th Cir. 2002) (“[D]efendant’s
16 banner advertisements and headlines satisfy [the second] element because they use only
17 the trademarked words, not the font or symbols associated with the trademarks.”). But
18 using a mark’s distinctive lettering, copying the logo, or copying images may result in
19 using more than reasonably necessary. *New Kids on the Block v. News Am. Pub., Inc.*, 971
20 F.2d 302, 309 n.7 (9th Cir. 1992) (“[A] soft drink competitor would be entitled to compare
21 its product to Coca-Cola or Coke, but would not be entitled to use Coca-Cola’s distinctive
22 lettering.”); *Toyota Motor Sales*, 510 F.3d at 1881–82 (finding the use of the stylized
23 “Lexus L” was more use of the mark than necessary); *Walt Disney Prods. v. Air Pirates*,
24 581 F.2d 751, 758 (9th Cir. 1978) (“By copying the images in their entirety, defendants
25 took more than was necessary to place firmly in the reader’s mind the parodied work and
26 those specific attributes that are to be satirized.”).

27 Despite its prior rulings, the Court is cognizant that Defendants have essentially
28 copy and pasted the stylized marks of Defendants along with those of other carriers on their

1 website in the device selection menu when customers look to sell their phones to
2 Defendants. As Plaintiffs note, Defendants “could use generic identifiers for carrier
3 selection, or even have customers fill out a text field with their carrier, but instead choose
4 to copy and paste the Xfinity Mark on their website.” (Doc. 94 at 8.) Therefore,
5 Defendants used more than reasonably necessary to identify Plaintiffs’ products and
6 services and nominative fair use is not available for its use in offering its services in buying
7 various phones or to the extent it is used to sell phones. *But see Church*, 411 F.2d at 352
8 (refusing to enter an injunction where the defendant abandoned the infringing use without
9 indicating an intent to resume the infringing use at a later time).

10 Regarding Defendants use of Plaintiffs’ marks in selling phones, Plaintiffs argue
11 Defendants advertise and sell materially different phones bearing Plaintiffs’ mark. (Doc.
12 87 at 7.) Plaintiffs contend that Defendants sold over twenty phones they “knew or should
13 have known” were blocklisted and did not notify the purchasing customers of the defect.
14 (*Id.* at 8.) Defendants argue the phones do not bear Plaintiffs’ mark, rather they bear
15 Apples’ because the phones at issue are iPhones. (Doc. 92 at 8.) But Plaintiffs alluded to
16 a “representative example of Defendants’ product packaging,” which indicates “Apple
17 iPhone 11 Pro Max (X-Finity) 256GB Silver,” to argue Defendants advertise the devices
18 as “genuine XM Phones.” (Docs 87-1 at 12 ¶ 53; 87-7.) Presumably then, although not
19 expressly stated, “(X-Finity)” is the purported use of the mark in the sales. *See* U.S.C.
20 § 1114(1)(b) (relating to infringing use of a mark on a label in connection with distribution
21 of goods with the intent to confuse, mislead, or deceive). Without more, it is pure
22 speculation that this label did not accurately identify the contents of the package or that
23 Defendants intended to cause confusion, mistake, or to deceive. Further, this use of the
24 mark does not copy or recreate the mark, unlike the mark used on the website, and serves
25 purely identification purposes the Ninth Circuit has approved of previously as discussed.

26 Plaintiffs’ proffered evidence does not highlight any buyers of Defendants’ phones
27 that were mislead into thinking they bought phones operable on Plaintiffs’ network.
28 Plaintiffs offered evidence of an investigator who intentionally sold blocklisted phones to

1 Defendants and then discussed buying locked and unlocked phones from them, noting that
2 he was the only person that could unlock Plaintiffs' phones. (Docs. 87-12; 87-13; 87-14.)
3 This is a far cry from establishing confusion or mistake and suggests the Defendants'
4 buyers are aware of the nature of the phones Defendants sell. Additionally, Defendants'
5 use of the mark on the website for buying phones is too far attenuated from their sales and
6 Plaintiffs have not established evidence otherwise to suggest sponsorship or endorsement.

7 As to false advertising, it requires the Defendants to misrepresent an affiliation in
8 connection with their goods or services or to "misrepresent the nature, characteristic,
9 qualities, or geographic origin of [its] . . . goods, services, or commercial activities." 15
10 U.S.C. 1125(a)(1)(A)–(B). The terms of service do ambiguously reference "all trademarks
11 . . . relating to products . . . available through [the] Website," but in context, as Defendants'
12 argue, this refers to use Defendants' trademarks and not Plaintiffs'. (Doc. 92 at 8.) The
13 marks in isolation, as this Court reasoned, is used to differentiate the carriers of origin for
14 the phones Defendants would buy—it says nothing about Defendants selling those phones.
15 (Doc. 77 at 5.) For these reasons, the vague terms of service coupled with the use of the
16 mark on the website or packaging does not lead to a reasonable inference that Plaintiffs
17 sponsor or endorse Defendants in buying phones and is too far attenuated from the sales.
18 See 15 U.S.C. § 1125(a)(1)(A); *Toyota Motor Sales*, 610 F.3d 1171, 1176 (9th Cir. 2010)
19 (finding inferring sponsorship or endorsement more than necessary may overcome
20 nominative fair use).

21 Plaintiffs have not established evidence of confusion in Defendants selling phones
22 to third parties. Instead, Plaintiffs argue Defendants sell materially different phones,
23 relying on Plaintiffs' marks for advertisement and sales, but as discussed, this argument
24 lacks factual support. Additionally, the evidence they proffered from their investigator
25 supports inferring Defendants' buyers are aware of the conditions and limits of the phones
26 they are buying. Therefore, Plaintiffs' have failed to meet their burden to overcome
27 nominative fair use with regards to the use on the packaging in selling the phones. *Toyota*
28 *Motor Sales*, 610 F.3d at 1183.

1 Finally, to the extent Plaintiffs raise arguments against application of the first sale
2 doctrine (Doc. 94 at 9), Defendants—again—have not argued first sale doctrine (Doc. 92
3 at 7–11). The Court refuses to address these arguments.

4 **IV. Amendment**

5 The Court will grant Plaintiffs’ Motion for Leave to Amend in part only as it relates
6 to the trademark claims and use of the mark on the website consistent with the reasoning
7 above. The Court declines to grant Plaintiffs’ Motion in all other respects. Therefore,
8 Plaintiffs will have fourteen (14) days from the date of entry of this Order to submit the
9 Second Amended that is consistent with this order.

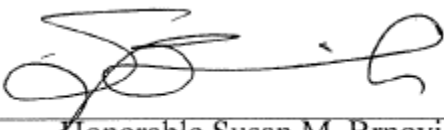
10 **V. CONCLUSION**

11 Accordingly,

12 **IT IS HEREBY ORDERED** granting in part and denying in part Plaintiffs’
13 Motion for Leave to Amend (Doc. 87).

14 **IT IS FURTHER ORDERED** Defendants file an Answer no later than 20 days
15 after the new complaint is filed.

16 Dated this 29th day of August, 2024.

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20 Honorable Susan M. Brnovich
United States District Judge
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